IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

FRIDAY, THE 26TH OCTOBER 2007 / 4TH KARTHIKA 1929

CRL.A.No. 786 of 2004()

SC.261/1999 of SESSIONS COURT, THALASSERY
CP.76/1998 of JUDL.MAGISTRATE OF FIRST CLASS COURT, TALIPARAMBA
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APPELLANT:

JOMON @ JOSEPH,
CONVICT NO.C-326, CENTRAL PRISON, KANNUR.

BY ADV. SRI.GRASHIOUS KURIAKOSE

RESPONDENT:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26/10/2007 ALONGWITH CRA NO.1068 OF 2004 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

CRL.A.NOS.786 & 1068 OF 2004 ()

Dated this the 26th day of October, 2007

J U D G M E N T

KOSHY,J.

Three accused were charge sheeted for the offences punishable under Sections 302, 307, 120(B), 109, 114 and 201 read with Section 34 of the Indian Penal Code. After trial and before judgment was pronounced A1 absconded and his case was separated and judgment was pronounced only with respect to A2 and A3. Both were convicted for the offences punishable under Section 302, 307 read with Section 34 of IPC, 201 and 120(B) of IPC. No separate sentence was awarded to A3 for the offence punishable under Section 140 and 109 read with Section 34 of IPC. Aggrieved by the above conviction and sentence, A2 filed Crl.A.No.786/2004 and A3 filed Crl.A.No.1068/2004. 1st and 2nd accused are brothers. 3rd accused is the wife of the deceased. The allegation was that the husband of the 3rd accused was murdered by A1, A2

and A3 together and they also attempted to murder daughter of the deceased (PW2) in furtherance of their common intention. According to the prosecution, his murder was result of a criminal conspiracy. There was allegation that there was illicit relationship between the 1st accused and the 3rd accused. It is the case of the prosecution that at 2.30 a.m. on 27.6.1997, 1st and 2nd accused entered into the house of the deceased at Eruvessy amsom at Chundakunnu, where his family consisting of his wife A3, their daughter Leena PW2 and son PW3 were residing. The 1st and 2nd accused entered into the bed room where deceased Mohanan and his family were sleeping. The door was opened by A2 for their entrance. Then 1st and 2nd accused together inflicted fatal injuries on the head and other parts of the body with deadly weapons like handle of axe and stones with the active support and help of the third accused, as she was present at the time in the bed room and abetted for the commission of the offences and after inflicting the fatal injuries to the deceased Mohanan, A1 and A2 took him and put him into the well at the courtyard of the house. On hearing the cry of her father when Leena (PW2) woke up,

1st and 2nd accused inflicted injuries on her with the said handle of axe and also hit with a stone at her head with the active help of A3. When Leena ran out of the house, 2nd accused chased her and beat on her head with iron rod and thereby she fell down unconscious and then A1 and A2 took her and put her into the same well. She was able to escape and because of effective treatment, she survived. After the incident, 1st and 2nd accused removed the blood stains and other blood stained articles and the weapons of offences from the place so as to conceal the murder and the 3rd accused informed the neighbours that her husband and her daughter were missing with intend to divert the attention and also to mislead others. PW1, a neighbour on 27.6.1997, in the early morning informed to the police station, which is situated about 10 kms away from the place of incident on the belief that Mohanan had committed suicide and his daughter plunged into the well in an attempt to rescue her father. Consequently the F.I.R. was registered for “unnatural death”. The S.I. of Police came to the place of occurrence and was of the opinion that it was a cold blooded murder and he filed Ext.P14 report and thereafter the present

charges were laid against A1 and A2. Thereafter on further enquiry, 3rd accused was also made in the array of the accused and incorporated Sections 302, 307 and 201 read with Section 34 of IPC.

2. PW1 has not seen the incident. But he gave F.I.Statement which was proved by him. PW2 Leena who was injured gave the evidence in accordance with the prosecution story. She stated that at 8 p.m. on the previous day, that is, 26.6.1997, A2 came to the house as the jeep which was purchased in the name of A3 was seized and kept in the police station and he wanted to take the jeep by producing the R.C.Book which was in the house of the deceased. But it was learnt by the deceased that R.C.Book was entrusted by his wife A3 to A1 for pledging it without his knowledge. Therefore, deceased asked A3 to go with A2 and get back the R.C.Book. After A2 and A3 left the house and before the return of A3, she (PW2) slept. She also stated that usually her parents and her younger brother sleep in a cot in the bed room and she will sleep in a separate bed. At the middle of the night, she woke

up hearing the cry of her father and at that time she had seen the accused nos.1 and 2 in the bed room, as she had identified the culprits at the light of the torch, which was having with the first accused. Suddenly the first accused gave a blow at the head of PW2 with some object. Then she cried and woke up from the bed and ran towards varandah of the house. But both the accused chased her and pulled her legs and dragged towards the back side of the house and then the second accused beat her with some object which appears to be an iron rod. On getting that blow she fell unconscious. She regained conscious when water touched at her face. Then she knew that she is inside the well at the courtyard of the house. There was heavy rain fall at the time of incident. The rope using for fetching water from the well touched her hands and she caught hold of the rope and sat at the pavement in the well. There was complete darkness. In the morning a neighbour called Pankajam PW5 came there for drawing water from the well. She has seen PW2 inside the well. Then the neighbours namely, Udayan, Vasu, etc. came there and they rescued PW2 from the well. At that time she realised that her father is also

in the well. She was taken to the Government Hospital, Taliparamba in a jeep by one Gopalakrishnan (PW8), Valsalachechi (PW12) etc. for treatment. On the way she told about the incident to the said Gopalakrishnan, on whose lap her head was resting. She deposed that she was thrown into the well by 1st and 2nd accused themselves. She has identified both the accused before the court. The third accused is her own mother. In the Taliparamba Hospital she has told the doctor, who treated her, about the incident. From that hospital she was taken to the A.K.G. Hospital and from there to Koyili Hospital and lastly to the Medical College Hospital, Kozhikode. She also stated that Valsalachechi, a neighbour who accompanied her in the hospital has given her another dress instead of the churidar, which was wearing by her at that time, and the Churidar was kept by Valsala Chechi. PW2 has categorically stated that she and her parents will sleep in the house only after bolting the door of the house and that the assailants A1 and A2 entered into the house since the door was opened to them by her mother A3. During the incident she has seen that her mother is standing at the varandah by

holding her brother. She also stated that she heard that A1 and A3 have some illicit relationship and A3 used to go to the house of A1. A1 was employed by them as driver and about $1^1/_2$ months before the incident, he was removed from the drivership and warned not to enter the house any more. PW16 deposed that A1 to A3 came to him and on pledging of R.C.Book of the jeep he as paid Rs.25,000/- to A1. Only on the previous day of the incident, A2 told him about the seizure of the jeep by Police. PW8 Gopalakrishnan deposed that when PW2 was saved, he has seen an injury on the back side of her head. PW18, the doctor in the Government Hospital, Taliparamba, who first treated PW2 and issued the wound certificate Ext.P12, has stated during evidence that the cause of injury was stated to him by PW2 herself and also by the persons who brought her in the hospital. The cause of injury as noted in Ext.P12 is “allegedly pulled into a well near her house by Jomon and Saiju, after beating on the head at about 3 p.m. on 27.6.1997”. Thus earlier version of PW2 supported the case of the prosecution. The injuries noted on PW2 are also stated by the doctor as follows:

1. An extensive lacerated injury on the back of the head measuring 10 x 10 cm with multiple radiations, skull bone exposed under the injury.

2. Lacerated injury of 2 cm x 0.5 cm depth not assessed, on the vertex of head.

The doctor referred the patient to the District Hospital, Kannur for expert management. The doctor has testified that the said injuries are possible by way of hitting with the weapons; MOs.4 and 5, and if beaten with force by using MO4, it can be broken into pieces. MO4 is the handle of an axe and MO4(a) is a piece of MO4, recovered by PW21, the investigating officer in accordance with Section 27 of the Evidence Act. The doctor (PW18) has further stated that the police questioned him by showing those weapons. He has opined that these injuries can cause death of the victim. During cross examination PW18 has asserted that the said injuries noted by him cannot be possible by falling or jumping into a well.

3. The injured PW2 was subsequently treated by PW19,

the Professor and Head of Department of Plastic Surgery, Medical College, Kozhikode, and he issued Ext.P13 discharge certificate. This doctor has mentioned in Ext.P13 as follows:

Diagnosis	:	Alleged assault.
	-	Atlento axial subluxation.
	-	Extensive bone deep lacerated wound occipital region of scalp.

This doctor also has opined that the said injury on PW2 is fatal and the same is possible with hitting at force with MOs.3,4 and 5. According to him this injury is fatal and not possible by a mere fall into the well. But the fall must be with great force on the side of the well. Thus it is evident that PWs.18 and 19, the doctors who examined and treated PW2, have ruled out the defence suggestions of falling or jumping into the well by PW2. According to them, the said injuries are sufficient to cause death in the ordinary course. PW3, brother of PW2 and younger son of A3 who was only aged 8 at the time of incident also woke up hearing of the cry of the sister. They saw A1 and A2 in the bed room and A3 was also there. A3 took him to

varandah. When PW3 asked his mother why sister is crying, she stated that father has got some quarrel with her and father is beating her. Thereafter PW3 was taken to the latrine situated outside the house and kept there for half an hour. When he went to latrine he saw A1 and A2 standing near the well. Then A3 took PW3 to the house of Gowri Chechi and called her. At that time she and her husband Narayanan came out of their house and at that time A3 told them that his father and his sister are missing. PW3 slept in the house of Narayanan till morning. Though his mother came again to the house of Narayanan (PW4) in the morning, she returned immediately and he has not seen her thereafter. Though PW3 has not seen the 1st and 2nd accused assaulting PW2, since he was taken outside by his mother the third accused, his evidence that he has not seen his father at the time when PW2 was crying, reveal that the accused have already removed his father from the room. Though PWs.2 and 3, the two material witnesses were subjected to searching cross-examination, nothing material could be elicited from them which may cast a doubt on their credibility. Evidence of PWs.2 and 3 were well

corroborated by evidence of PWs.4, 5 and 6. PWs.12, 13, 14 etc. and their evidence are in tune with the medical evidence. PWs.2, 4, 6, 13 and 14 also deposed regarding illicit relationship with A1 and A3.

4. PW7 conducted post mortem and issued Ext.P6 certificate. 19 ante-mortem injuries were noted. The doctor stated that injury nos.3, 4 and 5 on the head are sufficient to cause death. The above injuries are as follows:

> 3. Brain 1400 gm showed subdural haemorrhage with clots back aspect both sides. Superficial lacerated wound 6 x 1 cm tempero - parietal area left side of brains extending from the front of temporal lobe of brain. Under surface of left temporal pole of brain showed multiple contused areas varying from 0.5 x 0.3 to 1 x 0.8 cm. Back aspect of left cerebellum showed a contusion 3 x 2 cm and right side 2 x 1 cm.
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> 4. Fissured fracture left tempero parietal bone. It started 1.5 cm outer to left parietal eminence proceeded upwards and to the front for 5 cm and then reaching the coronal suture extended downwards as fracture separation.
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> 5. Fissured fracture left occipital bone extending from occipital eminence downwards and outerwards to the front for 4 cm terminating 1 cm above the rim

of foramen magnum left side.

On seeing MOs.3,4 and 5, that is, Granite stone, handle of axe and wooden plank respectively, the doctor is of the opinion that the said injuries are possible with those objects. On the disclosure of A2 that his brother A1 gave MOs.3, 4 and 5 after packing the same in a cloth bundle and he has hidden in the brick quarry conducted by PW9. PW9 is a witness for the seizure of the said articles and also MO7 series and MOs.11 and 14, which were recovered by the accused and concealed along with MOs.3 to 5 in the quarry. He attested Ext.P8 seizure mahaxar and hence recorded evidence admissible under Section 27 of the Evidence Act and also corroborated by the evidence of PWs.2 and 3.

5. Now we will come to the defence as revealed, by the statement of A1 and A2 under Section 313. According to them, they were in Wyanad for ginger cultivation. But no effort is made by them to prove the plea apart from the statement under Section 31. Evidence of PWs.4 and 14 shows that they

were present near the place of incident during the relevant time. As held by the Apex Court in ***Rajesh Kumar v. Dharamvir and others ((1997) SCC (Crl) 591)***, plea of alibi shall be proved with absolute certainty excluding the presence of the accused at the time of crime. In ***Binay Kumar Singh v. State of Bihar ((1997) SCC (Crl) 333)*** it was held that strict proof is required for alibi. Here alibi is not proved. A wrong defence of alibi only boomerang on the accused as it is an additional circumstance. Evidence in this case clearly prove that the 1st and 2nd accused entered the house of the deceased when A3 opened the house and in furtherance of common intention of A1 to A3 to kill the deceased, 1st and 2nd accused inflicted injuries on the head of the deceased with the actual help of A3 while deceased was sleeping in the bed room and killed him and all the three were guilty of offences punishable under Section 302 of IPC. Since PW2 saw the incident, with the intention of killing her, inflicted injuries on PW2 and threw her in to the well by A1 and A2 with active support of A3. They were guilty of offences punishable under Section 307 read with Section 34 of IPC. The totality of

evidence proved criminal conspiracy between A1 to A3. Hence they are guilty of offences punishable under Section 120 B. A3 has aided and abetted A1 and A2. A2 is guilty of offences punishable under Section 114 read with Section 104 of IPC. A1 and A2 put PW2 and the dead body of deceased into the well and blood stained cloths were concealed in the quarry of PW9 thus caused disappearance of evidence. A3 knowing well about the offence, spread false information that deceased and PW2 are missing with the intention of screening the accused A1, A2 and herself from punishment. Hence they are guilty of the offences punishable under Section 201 also. The trial judge has given good reasons for his findings. He has analysed the ingredients of offences under each sections and were found the accused guilty on the basis of admissible evidence. We are satisfied from the evidence that the ingredients of respective offences for which appellants were convicted were proved by admissible evidence. Only proportionate sentence, considering the grounds of the offence, was imposed by the trial court.

In the above circumstances, we fully agree with the findings of the trial court and we confirm the conviction and sentence passed in this case and hence both appeals are dismissed.

J.B.KOSHY, JUDGE

T.R.RAMACHANDRAN NAIR, JUDGE

prp

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

CRL.A.NOS.786 & 1068 OF 2004 ()

J U D G M E N T

26th October, 2007